UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CHEMISTRY COUNCIL, INC., Plaintiff, v. ROB BONTA, in his Official Capacity as Attorney General of California, Defendant.	Civil Action No. 1:24-cv-01533-APM

UNOPPOSED MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF BUSINESS TRADE ASSOCIATIONS IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Local Civil Rule 7(o), the Chamber of Commerce of the United States of America, the California Chamber of Commerce, the American Petroleum Institute, the Alliance for Automotive Innovation, CropLife America, and the National Mining Association, respectfully file this motion for leave to file an *amici curiae* brief in support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 16). Pursuant to Local Civil Rule 7(m), undersigned counsel conferred with counsel for each of the parties. Plaintiff consents to this Motion; Defendant takes no position. A proposed order and a copy of the proposed *amici curiae* brief are attached.

The **Chamber of Commerce of the United States of America** is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and

the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The **California Chamber of Commerce** is a non-profit business association with approximately 13,000 members, both individual and corporate, representing 25% of the state's private sector workforce and virtually every economic interest in the state of California. While CalChamber represents several of the largest corporations in California, 70% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

The **American Petroleum Institute** is a national trade association representing nearly 600 companies involved in all aspects of the oil-and-natural-gas industry. The American Petroleum Institute frequently advocates for the interests of its members by participating as an *amicus curiae* in cases that are important to the oil-and-natural-gas community.

The **Alliance for Automotive Innovation** represents the full auto industry—from the manufacturers producing most vehicles sold in the U.S. to autonomous vehicle innovators to equipment suppliers, battery producers and semiconductor makers—a sector supporting 10 million American jobs and five percent of the economy. Active in Washington, D.C. and all 50 states, the association is committed to a cleaner, safer and smarter personal transportation future.

CropLife America is a nationwide not-for-profit trade association representing the major manufacturers, formulators, and distributors of pesticide products. CropLife America's member companies produce, sell, and distribute virtually all the pesticide products used by American farmers, professional users, and consumers, including the vast majority of pesticides registered by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et*

seq. CropLife America represents its members' interests by, among other things, monitoring and commenting on federal agency actions, as well as participating in litigation related to pesticides.

The **National Mining Association** is a nonprofit national trade association that represents the interests of the mining industry, including the producers of most of the nation's coal, metals, and agricultural and industrial minerals. The National Mining Association has over 250 members, whose interests it represents before Congress, the administration, federal agencies, the courts, and the media. The National Mining Association works to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American-sourced materials necessary for U.S. manufacturing, national security, and economic security, all delivered under world-leading environmental, safety, and labor standards.

Amici and their members have a strong interest in this case because California's aggressive use of the subpoena power to obtain the confidential planning materials and membership information of an organization with which it disagrees will chill protected expression guaranteed by the First Amendment and impede constructive dialogue on issues of public concern. Just as the American Chemistry Council filed public comments expressing its views on the "Green Guides" noticed by the Federal Trade Commission, so too do many trade and other advocacy organizations routinely file public comments on *thousands* of regulatory and subregulatory actions similarly noticed by federal administrative agencies every year. *Amici* and their members have a strong interest in protecting their ability to do so without disclosing their members or internal deliberations whenever a state government opposes their views, and without threat that a government with opposing viewpoints will attempt to punish their advocacy or silence the views with which it disagrees.

Amici submit this brief to apprise the Court of additional background on the First Amendment privilege and the role it plays in preserving the speech and associational freedoms of trade and other advocacy organizations. *Amici* represent a broad cross section of industry viewpoints, and will thus be able to provide the Court with additional perspective on the importance of the First Amendment privilege across a wide segment of the economy that is not adequately represented by the parties in the case.

Amici's motion is timely as it is filed before the parties have fully briefed Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction and before the Court has scheduled a hearing for the Motion.

For these reasons, the Court should allow *amici* to file the attached brief in this matter.

Respectfully submitted,

/s/ Jeremy J. Broggi

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Dated: June 20, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2024, I caused a true and correct copy of the foregoing document to be served upon all counsel of record registered with the Court's ECF system, by electronic service via the Court's ECF transmission facilities.

/s/ Jeremy J. Broggi
Jeremy J. Broggi (D.C. Bar No. 1191522)

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***AMICI CURIAE* BRIEF OF BUSINESS TRADE ASSOCIATIONS IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

LOCAL CIVIL RULE 7 STATEMENT

Pursuant to Local Civil Rule 7(o)(5) and Federal Rule of Appellate Procedure 29(a)(4), *amici curiae* state as follows:

The Chamber of Commerce of the United States of America states that it is a nonprofit, tax-exempt organization incorporated in the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10% or greater interest in the Chamber.

The California Chamber of Commerce is not a publicly held corporation and has no parent corporation. No publicly held company has 10% or greater ownership interest in the California Chamber of Commerce.

The American Petroleum Institute is not a publicly held corporation and has no parent corporation. No publicly held company has 10% or greater ownership interest in the American Petroleum Institute.

The Alliance for Automotive Innovation is not a publicly held corporation and has no parent corporation. No publicly held company has 10% or greater ownership interest in the Alliance for Automotive Innovation.

CropLife America is not a publicly held corporation and has no parent corporation. No publicly held company has 10% or greater ownership interest in CropLife America.

The National Mining Association is not a publicly held corporation and has no parent corporation. No publicly held company has 10% or greater ownership interest in the National Mining Association.

Counsel for *amici curiae* certify that no counsel for a party authored any part of this brief. No entity or person, other than *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

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FTC	Federal Trade Commission

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INTEREST OF *AMICI CURIAE*

The **Chamber of Commerce of the United States of America** is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

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Amici and their members have a strong interest in this case because California's aggressive use of the subpoena power to obtain the confidential planning materials and membership information of an organization with which it disagrees will chill protected expression guaranteed by the First Amendment and impede constructive dialogue on issues of public concern. Just as the American Chemistry Council filed public comments expressing its views on the "Green Guides" noticed by the Federal Trade Commission, so too do many trade and other advocacy organizations routinely file public comments on *thousands* of regulatory and subregulatory actions similarly noticed by federal administrative agencies every year. *Amici* and their members have a strong

interest in protecting their ability to do so without disclosing their members or internal deliberations whenever a state government opposes their views, and without threat that a government with an opposing viewpoint will attempt to punish their advocacy or silence the views with which it disagrees.

INTRODUCTION

The state of California is teaching a masterclass on how to violate the First Amendment. California seeks to leverage the coercive power of government to silence a message with which it disagrees and to punish public advocacy in a proceeding before a federal administrative agency. When the FTC solicited comment on a proposed revision to guidance on the definition of "recyclable" in marketing claims, California and ACC went head-to-head on the merits. But rather than resting on its own speech's ability to persuade, California now seeks to punish ACC for its dissenting speech because it is, in California's view, "untrue." To that end, California has issued a subpoena that would compel ACC to disclose confidential, internal information about its strategy, focus, policy perspectives, viewpoints, and preferences, including its confidential communications with its members about its advocacy before the FTC. This would reveal both ACC members' identities and their individual views on the public-policy issues California considers undebatable. But the First Amendment privilege protects those confidential communications from disclosure to a state government attempting to ferret out and punish opposing views. Indeed, California's response to ACC's speech illustrates precisely why the First Amendment privilege so diligently protects speaker anonymity.

California has no legitimate interest whatsoever in obtaining these communications. Unlike in a more typical case, California's subpoena does not incidentally burden ACC's speech and association rights as a necessary cost of investigating a separate matter. Rather, California's target is ACC's speech itself. And California has no conceivable legitimate interest in regulating

ACC's speech *to the FTC*. California's sovereign duty is to its citizens, not the United States government. Even if the pertinent speech had been to Californians, moreover, California has pointed to no interest that plausibly could overcome First Amendment privilege. California disagrees with certain of ACC's assertions, believing that "emerging evidence" refutes some of them and that others are "potentially" untrue. But we have no Ministry of Truth in this country. The government's mere belief that an American's speech is false cannot possibly be enough to pierce the First Amendment privilege. Otherwise, any organization that sometimes asserts controversial or unpopular facts or beliefs—from Planned Parenthood to the NRA—would have no protection at all.

On the other side of the ledger, the subpoena's burden and chill on First Amendment rights is severe. The Supreme Court has repeatedly found that an organization has a substantial interest in maintaining the anonymity of its donors or members. California's subpoena implicates that interest and then some—it would reveal not only ACC members' identities but also their internal deliberations about their political advocacy. And ACC's interests are heightened additionally both because its speech is further protected by the First Amendment's Petition Clause and because compelled disclosure here would feed strategically sensitive information to a political adversary.

California's requests also discriminate on the basis of viewpoint. California would not be attempting to pierce ACC's First Amendment privilege had ACC expressed California's preferred views on recycling. Treating the expression of favored and disfavored views differently is the definition of viewpoint discrimination. And viewpoint discrimination is virtually per se unconstitutional.

Because the First Amendment guarantees the right of an association like ACC to keep its private materials private, this Court should enjoin California from enforcing the subpoena.

ARGUMENT

I. THE FIRST AMENDMENT PRIVILEGE PROTECTS AN ASSOCIATION'S CONFIDENTIAL MATERIALS FROM COMPELLED DISCLOSURE

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Because effective exercise of these rights "is undeniably enhanced by group association," *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), the Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others," *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021); *see also NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.").

The right to associate entails the right to do so privately. The Supreme Court has "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64 (collecting cases). For example, in *NAACP v. Alabama*, the Supreme Court held that the First Amendment prohibited Alabama's Attorney General from compelling the NAACP to provide "the names and addresses of all its Alabama members and agents." 357 U.S. at 451. And in *Americans for Prosperity Foundation v. Bonta*, the Supreme Court held that California could not require charities to disclose "the identities of their major donors" to the same Attorney General Bonta who seeks ACC's information here. 594 U.S. at 600–01. In both circumstances, the Supreme Court concluded that the government's demands for confidential group information violated the First Amendment based on "the vital relationship between freedom to associate and privacy in one's associations." *Id.* at 606–07 (quoting *NAACP v. Alabama*, 357 U.S. at 462).

These cases and others stand for a straightforward principle: When the Government requires "disclosure of an association's confidential internal materials it intrudes on the 'privacy of association and belief guaranteed by the First Amendment,' as well as seriously interferes with internal group operations and effectiveness." *AFL-CIO v. FEC*, 333 F.3d 168, 177–78 (D.C. Cir. 2003) (quoting *Buckley*, 424 U.S. at 64). That privacy is all the more important where the association and the government are on opposite sides of a policy issue. *See, e.g.*, *Black Panther Party v. Smith*, 661 F.2d 1243, 1265 (D.C. Cir. 1981) ("privacy is important where the government itself is being criticized, for in this circumstance it has a special incentive to suppress opposition"), *vacated as moot*, 458 U.S. 1118 (1982). Courts have routinely found that the First Amendment privilege bars government efforts to obtain, among other things, an organization's "internal planning materials," *AFL-CIO*, 333 F.3d at 177, its "strategic pre-lobbying communications," *In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d 470, 481 (10th Cir. 2011), its "internal campaign communications" and related "internal campaign information," *Perry v. Schwarzenegger*, 591 F.3d 1126, 1141–43 (9th Cir. 2009), information about its structure and organization, *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) (plurality opinion), and information about the "identities of its leaders and members," *Black Panther Party*, 661 F.2d at 1264; *see also NAACP v. Alabama*, 357 U.S. at 451.

II. CALIFORNIA'S REQUESTS VIOLATE THE FIRST AMENDMENT PRIVILEGE

A. California's Requests Substantially Burden And Chill Fundamental First Amendment Rights

The burden and chill on First Amendment rights in this case is severe. The Supreme Court has repeatedly given substantial weight to an association's interest against compelled disclosure of its members' identities. *See Americans for Prosperity Found.*, 594 U.S. at 606; *NAACP v. Alabama*, 357 U.S. at 462. Here, California's requests implicate that interest and then some. The

requests seek not only the identities of ACC members but also their private communications concerning political strategy and messaging on an issue where they dissent from California's view. And because they concern ACC's participation in an FTC proceeding, California's requests implicate ACC members' right to participate in the political marketplace of ideas and their right to petition their government.

An advocacy organization's interest in maintaining the anonymity of its members is weighty on its own. Our nation has had a "respected tradition of anonymity in the advocacy of political causes" since the Federalist Papers and before. *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 343 & n.6 (1995). In our country, anonymous speech is "not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 357. Anonymity is, indeed, "a shield from the tyranny of the majority." *Id.* It "exemplifies" the very "purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Id.* When it comes to anonymous speech, the government interest in deterring "fraudulent conduct" must yield to the "greater weight" of the "value of [the] speech." *Id.*; *see also Americans for Prosperity Found.*, 594 U.S. at 617 (contributors had good "reason to remain anonymous"). Losing anonymity has the "inevitable result" of "deter[ring] … the exercise of First Amendment rights." *Americans for Prosperity Found.*, 594 U.S. at 607.

Anonymous speech is especially important to trade associations, which exist to confidentially collect and represent the views of anonymous members. Here, for example, ACC "does not, as a matter of practice, make public the identities of particular members engaged in any particular working group or engaged in developing particular public advocacy positions and strategies." Eisenberg Decl. ¶ 5, Dkt. No. 16-3. That anonymity allows members to engage in

the political marketplace without fear of being punished by a government for advancing unpopular ideas. *See Talley v. California*, 362 U.S. 60, 65 (1960) ("anonymity has sometimes been assumed for the most constructive purposes"); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002) ("there are a significant number of persons who support causes anonymously"). Because the protection afforded by the First Amendment privilege applies "whether the beliefs sought to be advanced by association pertain to political, *economic*, religious, or cultural matters," *NAACP v. Alabama*, 357 U.S. at 460 (emphasis added), it plainly extends to "trade groups and their members," *In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d at 481; *see also, e.g.*, *In re Recalled Abbott Infant Formula Prods. Liab. Litig.*, 2024 WL 36982, at *1 (N.D. Ill. Jan. 3, 2024) ("the freedom to associate with others for common advancement of political beliefs and ideas … applies to trade associations").

While in *Americans for Prosperity Foundation* and *NAACP v. Alabama* the burden the government sought to impose was only the required disclosure of members' identities, here the burden is also the required disclosure of the *content* of members' speech, including discussion of strategy and messaging in the political arena. That ratchets up the burden and chill on their First Amendment rights. Indeed, when government action reveals to a trade association's "opponents" its "activities, strategies and tactics," the government has "directly frustrate[d]" the trade association's "ability to pursue [its] political goals effectively," "in addition to the risk of chilling individual participation." *AFL-CIO*, 333 F.3d at 177. That "implicate[s] significant First Amendment interests in associational autonomy." *Id.*

Both to avoid chilling its members' speech and to keep deliberations confidential, ACC does not make public "communications related to the development of its public advocacy positions and strategies." Eisenberg Decl. ¶ 6. Disclosure of these communications, as the D.C. Circuit

recognized in *AFL-CIO*, would seriously reduce ACC's effectiveness. "Written communication with ACC's membership is a vital method of communication ACC uses to work with its members in developing public advocacy positions and strategies." *Id.* ¶ 7. But ACC and its members may halt those communications altogether if there is substantial risk that they will be disclosed to political adversaries.

With decades of experience representing hundreds of thousands of members who wish to participate in the political marketplace without incurring the costs associated with identification, *amici* can affirm that ACC's response is rational. Trade associations generally must canvass members to discern their individual views and resolve differences, and must do all that before taking public positions. A doctrinal rule allowing the government to compel disclosure of anonymous speech of dissenting trade associations would definitely chill the speech of all trade associations and their members. Such a rule would "constrict access" to the political marketplace for trade associations "[r]egardless of what organizations one joins or what causes one believes in." *Do No Harm v. Pfizer Inc.*, 96 F.4th 106, 126 (2d Cir. 2024) (Wesley, J., concurring in part and concurring in the judgment); *cf. Speech First, Inc. v. Shrum*, 92 F.4th 947, 952 (10th Cir. 2024) (Supreme Court has "for decades permitted standing based on pseudonyms or outright anonymity"). "[T]hat is a troubling result." *Do No Harm*, 96 F.4th at 126 (Wesley, J.).

The chill and burden here is heightened further still by the fact that the speech California seeks to reveal is ACC's participation in a federal administrative proceeding. That implicates ACC's First Amendment right to petition its government. *See Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 738 (D.C. Cir. 2011) ("The right extends to petitioning all departments of the Government, including administrative agencies." (cleaned)). The right to petition has a rich pedigree that "long antedate[s] the Constitution." *McDonald v. Smith*, 472 U.S. 479, 482 (1985); *see also Borough of*

Duryea v. Guarnieri, 564 U.S. 379, 395 (2011) (right to petition "is of ancient significance" in the "Anglo–American legal tradition"). And the right to petition bars the government from penalizing citizens for exercising it. *See Guarnieri*, 564 U.S. at 396 (1689 English Declaration of Rights stated that "it is the Right of the Subjects to petition the King, and all Commitments and Prosecutions for such Petitioning are Illegal"); 1 William Blackstone, Commentaries *139 ("[A]ll commitments and prosecutions for such petitioning [were] illegal."). But that is exactly what California is doing—punishing ACC because it petitioned the FTC with ideas California disfavors.

The kind of petitioning ACC undertook here is by no means anomalous—to the contrary, the opportunity to comment on planned governmental action is a fundamental component of the contemporary administrative state. "The essential purpose of according … notice and comment opportunities," the D.C. Circuit has explained, "is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980). And it has practical value too. As the Supreme Court has put it, "[n]otice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes," as well as affords agencies "a chance to avoid errors and make a more informed decision." *Azar v. Allina Health Servs.*, 587 U.S. 566, 582 (2019). *Amici* and their members wish to continue participating in notice-and-comment processes without fear of losing anonymity or exposing their internal deliberations.

Finally, the burden and chill are especially severe here for yet another reason: ACC would be compelled to disclose its communications to an entity that has proven to be an aggressive political adversary. *See AFL-CIO*, 333 F.3d at 178 (accounting for perverse "incentive for political adversaries to attempt to turn … [a] disclosure regulation to their own advantage"). The political context of California's subpoena adds significantly to its burden and chill. *See Dep't of Com. v.*

New York, 588 U.S. 752, 785 (2019) (courts "are not required to exhibit a naiveté from which ordinary citizens are free" (cleaned)).

B. No Legitimate Government Interest Supports California's Requests

When a disclosure requirement burdens First Amendment rights, it triggers careful scrutiny of the strength of the governmental interest and the tailoring of the disclosure requirement to that interest. Compelled-disclosure requirements must satisfy "strict scrutiny" or at minimum "exacting scrutiny." *See Americans for Prosperity Found.*, 594 U.S. 595, 619 (Thomas, J., concurring in part and concurring in the judgment) ("strict scrutiny [applies] to laws that compel disclosure of protected First Amendment association'"); *id.* at 606–08 (plurality) ("exacting scrutiny" applies to "compelled disclosure" requirements); *id.* at 623 (Alito, J., concurring in part and concurring in the judgment) ("I see no need to decide which standard should be applied here."). Either way, "[w]hen a law burdens core political speech," courts "uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre*, 514 U.S. at 347; *see also Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) ("Speech on 'matters of public concern'" "is at the heart of the First Amendment's protection" and "occupies the highest rung of the hierarchy of First Amendment values."); *Meyer v. Grant*, 486 U.S. 414, 421–22, 425 (1988) (speech concerning "political change" is "core political speech" that "trenches upon an area in which the importance of First Amendment protections is 'at its zenith'"); *Americans for Prosperity Found.*, 595 U.S. at 611 (under exacting scrutiny the government must demonstrate "a substantial relation between the disclosure requirement and a sufficiently important governmental interest" and that the requirement is "narrowly tailored" to that interest).

California's requests serve no legitimate government interest at all. California's asserted government interest is extraordinary: California does not assert that the disclosures incidentally infringe ACC's speech as a necessary cost of an investigation into a separate matter but rather

asserts that the disclosures are needed because ACC's speech to the FTC is *itself* purportedly potentially unlawful. *See* Dkt. No. 16-2 (Petition to Enforce Investigative Subpoena ¶ 46, *People ex rel. Bonta v. ACC*, No. 24-cv-010509 (Cal. Super. Ct. May 28, 2024) (hereinafter "California Petition")) (California stating that its investigation concerns "ACC's provision of false facts and data to the FTC" and that "[t]his potentially unlawful and fraudulent speech is the speech to which the Attorney General is seeking access"). But California has no legitimate interest in policing ACC's speech *to the FTC*. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (states generally have no role in "[p]olicing fraud against federal agencies"). It is for the FTC to review the administrative record and determine what weight to give to the comments and studies submitted. *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made"). State governments have no interest in investigating and deterring Americans' petitioning of the federal government regardless what they think of the petition.

Even if ACC had been speaking to California citizens, moreover, California could not investigate its speech by gesturing vaguely at the notion of fraud. California presents no evidence of actual fraud—as opposed to policy-based statements it thinks are untrue. Indeed, California's petition to enforce leaves no doubt that the basis for its requests is ordinary political disagreement. For example, California disagrees with the way ACC's survey questions were framed. *See* California Petition ¶ 32 (a "close[] look" at ACC's survey questions reveals that they were "leading and misleading"), ¶ 43 ("Given the wording of the Study, it appears it was constructed in a way to reach specific conclusions."). But as any survey-maker knows, it is impossible to create survey questions that are incontestably neutral. And even if a trade association were to design survey

questions in objectively suboptimal ways (and there is no evidence of that here), that would not be fraud. Disagreement over the framing of survey questions occurs with nearly every survey; it cannot plausibly serve as a basis for piercing First Amendment privilege.

California also thinks that ACC has made "specific false statements in advertisements about advanced recycling" that "emerging evidence" "shows to be false." California Petition ¶ 26. But California's belief that certain ACC assertions are untrue cannot possibly suffice either. If state governments could pierce First Amendment privilege anytime they think someone has said something that is misleading or untrue, the privilege would be virtually meaningless. The "broad censorial power" the federal and state governments would hold under California's approach is "unprecedented in [the Supreme Court's] cases or in our constitutional tradition." *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality).

Because "[o]ur constitutional tradition stands against the idea that we need [a] Ministry of Truth," *id.*, "[u]nder our Constitution 'there is no such thing as a false idea,'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984); *see also Alvarez*, 567 U.S. at 719 (there is no "general exception to the First Amendment for false statements"); *303 Creative LLC v. Elenis*, 600 U.S. 570, 601–02 (2023) ("'no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion'"). If California disagrees with ACC's assertions, its proper recourse is to express its disagreement with those views—not to retaliate through a subpoena. The First Amendment "means that government has no power to restrict expression because of its message [or] its ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). "The remedy for speech that is false," then, "is speech that is true." *Alvarez*, 567 U.S. at 727. "The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Id.*; *see also id.* at 729 ("Truth needs neither handcuffs nor a

badge for its vindication."); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market"). The values of "open, dynamic, rational discourse" "are not well served" when the government seeks to "orchestrate public discussion" by restricting speech that it considers untrue. *Alvarez*, 567 U.S. at 728.

Because California's asserted government interest is premised on a theory at odds with the Free Speech Clause's primary purpose, it cannot be credited with any weight at all.

C. California's Requests Are Insufficiently Tailored

Compelled disclosures must not only advance a sufficiently important government interest but also be narrowly tailored to that interest. *Americans for Prosperity Found.*, 594 U.S. at 609 ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—because First Amendment freedoms need breathing space to survive." (cleaned)); *see also Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"). Here, as explained, there is no legitimate government interest to which the subpoena could be tailored. But even if there were, the subpoena would not be narrowly tailored.

For one, California has given no assurance that it would keep ACC's communications from the public. To the contrary, California has already publicized its investigation into ACC, and appears ready to use the communications to score political points. *See* ACC Br. 15 (quoting California press release). That alone "may have the effect of curtailing [ACC's] freedom to associate" through the "possible deterrent effect" on ACC's supporters and potential supporters who do not want to get caught in California's fire. *Americans for Prosperity Found.*, 594 U.S. at 616. Because disclosure requirements "can chill association 'even if there is no disclosure to the

general public,'" the chill would not be "eliminate[d]" even if California keeps the communications to itself. *Id.* (cleaned). But because "compelled disclosure of associational information to the public dramatically increases the risk of private retaliation against the members and supporters of potentially controversial groups" and "is more likely to chill the exercise of associational freedoms," it is "subject to a more stringent form of exacting scrutiny than the compelled disclosure of information to the government on a confidential basis." Amicus Br. of ACLU et al. at 5, *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021) (No. 19-251); *see also id.* at 17–22 (discussing cases).

For another, the subpoena indiscriminately seeks all of ACC's communications related to the FTC proceedings. This "blunderbuss approach," *McIntyre*, 514 U.S. at 357, is the opposite of narrow tailoring. California could have asked for communications directly related to whatever illegality it imagines. But its subpoena is not so narrow because its purpose is not so narrow—its aim, at bottom, is to "silence dissenting ideas." *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 818 (2000). The subpoena is undoubtedly tailored to *that* interest, but not to any constitutionally permissible one.

III. CALIFORNIA IS DISCRIMINATING ON VIEWPOINT

The Supreme Court has "long recognized" that "compelled disclosure of political affiliations and activities" "can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO*, 333 F.3d at 175–76; *see also, e.g.*, *NAACP v. Alabama*, 357 U.S. at 462 ("Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is" an "effective … restraint on freedom of association"). Viewpoint discrimination, therefore, is no more acceptable in the compelled-disclosure context than in any other. And viewpoint discrimination is one of the central ills the First Amendment targets. "At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is

uniquely harmful to a free and democratic society." *NRA v. Vullo*, 144 S. Ct. 1316, 1326 (2024). "Government discrimination among viewpoints … is a 'more blatant' and 'egregious form of content discrimination,'" which itself is "subject to strict scrutiny" and "presumptively invalid." *Reed v. Town of Gilbert*, 576 U.S. 155, 165, 168 (2015); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Except in the most extraordinary circumstances, viewpoint discrimination simply is not allowed. To counsel's knowledge the Supreme Court has *never* upheld viewpoint-discriminatory government regulation.

But viewpoint discrimination is the foundation for California's subpoena. "At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., joined by Ginsburg, J., Sotomayor, J., and Kagan, J., concurring in part and concurring in the judgment). That is exactly what California has done. As obvious from their dueling comments at the FTC, California and ACC have opposing views about important issues relating to recycling. And as obvious from its petition to enforce, California feels strongly that it is right and ACC is wrong. But under the First Amendment, California's hostility toward ACC's views does not enable it to unconstitutionally chill ACC's speech. By seeking to uncover confidential communications on the speculation that they might be "potentially unlawful"—supported by nothing but disagreement—California has singled out ACC's views for disfavored treatment. That is constitutionally impermissible.

CONCLUSION

The Court should grant the Motion and enjoin California from enforcing its unconstitutional subpoena.

Respectfully submitted,

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June 20, 2024

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CHEMISTRY COUNCIL, INC., Plaintiff, v. ROB BONTA, in his Official Capacity as Attorney General of California, Defendant.	Civil Action No. 1:24-cv-01533-APM

[PROPOSED] ORDER

Upon consideration of the Unopposed Motion for Leave to File *Amici Curiae* Brief of Business Trade Associations in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, it is hereby

ORDERED that the Motion for Leave is **GRANTED.** It is further

ORDERED that the *amici curiae* brief of Business Trade Associations submitted with its Motion is **DEEMED FILED AND SERVED** as of the date of this Order.

SO ORDERED this _____ day of _____ 2024

_____
HON. AMIT P. MEHTA
United States District Judge

LOCAL RULE 7(k) CERTIFICATION:
NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

In accordance with Local Civil Rule 7(k), the following attorneys are entitled to be notified of the proposed order's entry:

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